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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND LEE HONOR III, Defendant and Appellant.	A125334 (Solano County Super. Ct. No. VCR 198453)

I. INTRODUCTION

After a court trial, appellant was convicted of one count of second-degree robbery and, subsequently, sentenced to an aggregate term of 12 years for an armed robbery committed in the early morning hours of June 23, 2008, on a street in Vallejo. Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, appellant has filed a brief requesting that this court review the record and determine if there are any issues deserving of further briefing. We have done so, find no such issues, and hence affirm the judgment of the trial court.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of June 23, 2008, Keith Parks, age 19, arrived at his home in Vallejo between 1:00 and 2:00 a.m. Not wanting to face his parents at that hour, he fell asleep in his car in front of their home on Benson Avenue. He had not been using drugs or drinking that night.

At about 6:00 a.m., when there was daylight, Parks was awakened by a tapping on his car's window. He awoke to see appellant pointing a gun at him; becoming

immediately fearful, Parks rolled down his car's window, whereupon appellant demanded that he surrender his wallet and cell phone. Parks pleaded with appellant briefly, saying that his wallet had all the money he had at the time, but appellant said: "Just give me it . . . don't play with me." Appellant handed him both his cell phone and wallet, and appellant told Parks not to follow him. Appellant left in the direction of the rear of Parks car.

Via his rear view mirror, Parks saw appellant walking away quickly; as soon as he was out of sight around a curve in the street, Parks went into his house and called the Vallejo police. He told the police that he recalled the gun held by appellant as being a small black gun with a brown or red colored handle and a round cylinder for the bullets. He was not sure, however, if it was a real gun or a toy gun.

Vallejo Police Officer Yates, one of the responding officers, made contact with appellant a short time later and recovered from him a small black revolver—a real one—that had had its serial number removed. Appellant was arrested and taken to the Vallejo Police Department where he was read his *Miranda* rights. He told the questioning officer, Officer Jason Wentz, that he understood those rights, and agreed to talk to him. In no way appearing confused, appellant told Officer Wentz that he had been walking in the Benson Avenue area and had seen Parks seated in his car, and decided to rob him because, he said, he needed the money to eat. Appellant said he had a gun, which he had allegedly found a few days earlier in a gutter in Rancho Vallejo.

On January 13, 2009, the Solano County District Attorney filed a one-count information alleging that appellant had committed second-degree robbery in violation of Penal Code section 211.[1] The information also alleged that, in the course of the alleged robbery, appellant had used a firearm with the meaning of sections 12022.5, subdivision (a)(1) and 12022.53, subdivision (b).

[1] All further statutory references are to the Penal Code.

On February 23, 2009,[2] appellant waived his right to a jury trial and agreed to a court trial. Such a trial was held two days later, on February 25, with appellant being represented by counsel, a deputy public defender. Appellant had previously filed several motions in limine which, however, his counsel withdrew at the beginning of the court trial because, per that counsel, he was "stipulating to the prelim transcript." However, the prosecutor requested that, in view of that understanding between the parties, the court again advise appellant of his right to a jury trial. The court did so and, again, appellant personally waived that right; the court found the waiver to be intelligent and voluntary.

Appellant, through his counsel, then stipulated that the preliminary hearing transcript could be admitted into evidence in lieu of live testimony of the two witnesses who testified at that hearing, Parks and Officer Yates. Again being advised by the court of his rights, appellant indicated he understood them and that he was voluntarily waiving his rights to confront and cross-examine those two witnesses, and that he was not doing so in exchange for any promises from the prosecution or the court. The court thus found that appellant had intelligently and knowingly waived his Sixth Amendment right to confront and cross-examine witnesses and agreed to the admission of the preliminary hearing transcript into evidence as substantive evidence in the ensuing court trial.

The prosecution then called, as its only live witness, Officer Wentz, who testified to appellant's admissions to him at the Vallejo police station after he had been given his *Miranda* rights. The preliminary hearing transcript was then admitted into evidence, the prosecution rested, and counsel made their brief respective arguments to the court. The court found appellant guilty of the charged second-degree robbery and also found the two charged enhancements to be true.

At the first sentencing hearing held on May 12, the parties and the court discussed both the probation report (which had recommended the high term for the robbery conviction and noted that probation was prohibited due to appellant's use of a gun) as well as a contention of appellant in his "Statement in Mitigation" that imposition of the

[2] All further dates noted are in 2009.

longer-term sentence might constitute cruel and unusual punishment in view of appellant's age (20 at that time). The court granted a continuance for further briefing on that issue.

After receiving such briefing from the prosecution, the sentencing hearing resumed on May 27. The court denied appellant probation and opined that it would be an abuse of discretion to dismiss the section 12022.53 alleged enhancement, as appellant had requested. After reviewing appellant's criminal history, including his juvenile history, the court sentenced appellant to the low term of two years on the section 211 robbery charge, and added to it a 10-year enhancement under section 12022.53, subdivision (b). Pursuant to section 654, the court stayed imposition of a concurrent 10-year sentence for the enhancement charged under section 12022.5, subdivision (a). The aggregate sentence imposed was, thus, 12 years.[3] Appellant was awarded custody credits and ordered to pay a restitution fine.

Appellant filed a timely notice of appeal on June 24.

III. DISCUSSION

In view of appellant's agreement—clearly entered into on the advice of counsel—to waive a jury trial, and present the matter for a court trial based on the preliminary hearing transcript plus the in-person testimony of Officer Wentz, no procedural issues deserving of further briefing are apparent. Nor, based on that record, are the court's conclusions that appellant was guilty of robbery under section 211 and that both of the two charged enhancements were true.

Thus, the only issue presented by the record was that addressed—albeit briefly—by the parties in their pre-sentencing briefs to the trial court and at the May 12 and 27 sentencing hearing, i.e., does imposition of a 10-year enhancement of a second degree robbery conviction under section 12022.53, subdivision (b), constitute cruel and unusual

[3] The prosecution had sought a 13-year sentence, whereas appellant's counsel argued that the maximum aggregate term should be seven years, i.e., a three-year midterm for the section 211 robbery and a four-year midterm under section 12022.5. subdivision (a).

punishment under the circumstances of the case before us. We agree with the trial court that it does not.

The court concluded that the enhancement based on that section was substantially mandatory. The statute provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) [which section 211 is—see subdivision (a)(4)], personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years." (§ 12022.53, subd. (b).) Further, subdivision (h) of the same statute provides that "[n]otwithstanding section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (§ 12022.53, subd. (h.)

In their briefs to the trial court, the parties both discussed the case of *People v. Felix* (2002) 108 Cal.App.4th 994, 999-1002. In that case, our colleagues in the Fourth District affirmed the imposition of an enhancement under subdivisions (b) and (h) of this section on a 21-year old defendant who had car-jacked a car from a homeless woman who was parked in it, and did so by putting a gun in her rib area. The *Felix* court termed the 10-year enhancement a "mandatory punishment" (*id.* at p. 999), but went on to note that, under the law, such did not have to be imposed as and when it violated constitutional principles such as that prohibiting cruel and unusual punishment. The court held that, based on substantial prior appellate precedent and the facts of the case, even including the defendant's age, there was neither cruel and unusual punishment in that case, nor "punishment . . . grossly disproportionate to Felix's individual culpability based on his personal characteristics." (*Id.* at pp. 999-1001.)

Our Supreme Court denied review of the *Felix* decision (*id.* at p. 1002); further, that holding is the same as other cases which have addressed the same basic issue under the same or other subdivisions of section 12022.53. (See, e.g., *People v. Riva* (2003) 112 Cal.App.4th 981, 1003; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-19; & *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1216.)

The "cruel and unusual punishment" issue framed by the *Felix* case was clearly considered by the trial court here. In view of that fact and (1) the essentially uncontested issue of appellant's use of a gun in his robbery of Parks, (2) appellant's juvenile record, which included two sustained felony charges, one for battery on a school employee when appellant was just 15 and another for second degree robbery including an assault on the victim, (3) appellant's "unsatisfactory" performance while on juvenile probation, and (4) the preponderance of aggravating factors as determined by the probation department, we find no need for further briefing on the issue of the sentence imposed by the trial court.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.